Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1997

EASTERN NATURAL GAS CORP.,
and DEST EXPLORATION, INC.,
Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a trial court denial of a motion for judgment as a matter of law under FED. R. CIV. P. 50(a) ever be reviewed on appeal when the motion is made at the close of the nonmovant's case, but not renewed at the close of all the evidence?

2. May a court of appeals refuse to rule on a non-frivolous, timely appeal of a denial of a motion for a new trial filed as an alternative to a motion for judgment as a matter of law?

3. May a denial of a motion for partial summary judgment, on an issue which is strictly a question of law, be reviewed on appeal where the summary judgment motion is not renewed as a motion for judgment as a matter of law pursuant to FED. R. CIV. P. 50?

PARTIES TO PROCEEDING

The names of the parties to this proceeding appear on the cover. The Petitioners are corporations owned by individuals. They do not have corporate parents or any subsidiaries.

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2. The court of appeals' failure to rule on ENG's motion for a new trial effectively denied ENG's right to an appeal on that issue and made even more draconian the penalties imposed by the court's determination that ENG's motion for judgment as a matter of law did not comply with FED. R. CIV. P. 50. The Court should grant the Petition to correct this error and require the court of appeals to act on this timely filed, non-frivolous appeal. 12

3. The Court should grant this Petition to resolve a conflict in the circuits on the important question of whether a denial of a summary judgment motion on a matter of law (like other similar pre-verdict decisions on matters of law) may be reviewed on appeal in the absence of a FED. R. CIV. P. 50 motion on the issue. 16

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PETITION FOR WRIT OF CERTIORARI

Eastern Natural Gas Corp. and Dest Exploration Inc. (referred to herein together as "ENG") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit to address important and related questions concerning the interpretation and operation of FED. R. CIV. P. 50.

OPINIONS AND ORDERS BELOW

In the District Court:

1. Order, March 15, 1996 (granting, in part, Alcoa's[1] motion for partial summary judgment and denying ENG's motion for partial summary judgment)(R.76).

2. Order, in open court, August 21, 1996 (denying ENG's motion for judgment as a matter of law on the Alcoa fraud counterclaim) (Conference Tr. Vol. 8 at 1501).

3. Judgment, August 29, 1996 (entered on jury verdict against ENG on its claims and on the Alcoa counterclaim) (R. 122).

4. Amended Judgment, September 3, 1996 (amending the case caption) (R. 122).

5. Order and Ruling on Post-Trial Motions, November 14, 1996 (denying generally ENG's post-trial motions, but

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[1] Respondent, Aluminum Company of America (referred to hereinafter as "Alcoa").

granting a new trial unless Alcoa accepted remittitur reducing the damage recovery on its counterclaim to $397,338) (R. 138).

6. Amended Judgment, December 11, 1996 (reflecting Alcoa's acceptance of remittitur) (R. 140).

In the Court of Appeals:

7. Opinion, October 3, 1997, published as *Eastern Natural Gas Corp. v. Aluminum Co. of America*, 126 F.3d 996 (7th Cir. 1997) (App. A1).

8. Order, December 1, 1997, denying ENG's Petition for Rehearing (App. A15).

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit giving rise to this Petition was issued October 3, 1997 (App. A1). ENG's timely-filed Petition for Rehearing was denied by the court of appeals by an order filed December 1, 1997 (App. A15). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1)(1995).

STATUTES AND RULES INVOLVED

FED. R. CIV. P. 50:

> **Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings**

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment-- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial;

and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT OF THE CASE

ENG filed this action in the United States District Court for the Southern District of Indiana pursuant to 28 U.S.C. §1332 (1995). ENG alleged that Alcoa had breached an agreement to sublease (the "Sublease") and an August 1991 letter agreement. (R. 1, Complaint.) These contracts involved the grant by Alcoa of rights to explore for and develop natural gas and oil on property owned by Peabody Development Company ("Peabody"), but leased by Peabody to Alcoa. ENG claimed that Alcoa breached its agreements with ENG by, among other things, declaring ENG in default

of the Sublease, and then terminating the Sublease, because of alleged failures of ENG to satisfy certain requirements of the lease (the "Lease") between Alcoa and Peabody. Alcoa declared ENG in default of the *Sublease* for the alleged failure of ENG to comply with the *Lease*, but Peabody never declared a default under the Lease.

Both sides filed motions for partial summary judgment. (R. 29, Defendant's Motion, and R. 33, Plaintiffs' Motion.) For its motion for partial summary judgment, ENG argued that, as a matter of contract construction, and therefore a matter of law for the court, the Sublease did not give Alcoa the right to declare a default unless a default was declared under the Lease by Peabody.[2] The district court granted Alcoa's motion and ruled that the August 1991 letter agreement was not an enforceable contract. (R. 76.) The district court denied ENG's motion for partial summary judgment. (R. 76).

On August 1, 1996, the Court granted Alcoa's motion to withdraw its contract counterclaims and add a fraud claim (R. 102), and trial of the ENG breach of contract claims and the Alcoa counterclaim began on August 12, 1996. At the close of Alcoa's case, counsel for ENG moved for a judgment as a matter of law on the Alcoa fraud counterclaim. That motion was denied, and the trial court indicated that the counterclaim would be submitted to the jury. (Conference Tr.

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[2] The Sublease, in Section 2(f), provided that: *"ENG shall be entitled to the exclusive right to exercise all the rights and privileges granted to . . . Alcoa under the Lease . . . ."* (Plaintiff's Trial Exhibit 6.) ENG argued that this phrase must necessarily mean that ENG could stay in possession of the property as long as Alcoa had the right to possession of the property, i.e., until Peabody declared a default and terminated the Lease.

Vol. 8 at 1501.) Counsel for ENG then read parts of several depositions to the jury.[3] Counsel for ENG did not renew the Rule 50 motion at the close of all the evidence (the reading of the deposition excerpts) later the same day.

The jury returned a verdict against ENG on its breach of contract claims and returned a verdict of $450,000 against ENG on the Alcoa fraud counterclaim. (This amount was later reduced to $397,399 with the Alcoa acceptance of remittitur ordered by the district court (R. 140).) The district court denied the ENG post-trial motions and ENG appealed.

The court of appeals affirmed the trial court. The court declined to review the ENG motion for judgment as a matter of law on the fraud counterclaim because, while counsel moved for judgment at the close of Alcoa's case, he did not renew the Rule 50 motion at the close of all the evidence.[4]

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[3] Parts of all of these depositions had already been read to the jury as part of Alcoa's case. The parts introduced by ENG were introduced in rebuttal and not during Alcoa's case in chief, as a way, offered by counsel to ENG, of possibly shortening the reading (because reserving the reading until rebuttal would give counsel more time to condense the presentation). Tr. Vol. 7 at 1084.

[4] Alcoa never claimed to have been prejudiced by the failure of ENG to renew its Rule 50 motion at the close of all the evidence. In fact, neither the district court nor counsel for Alcoa ever raised the issue of the timeliness of the ENG Rule 50 motion. At the beginning of his oral argument in this case, counsel for ENG volunteered to the court of appeals that he had recently become aware of the court's decision in *Umpleby v. Potter & Brumfield, Inc.*, 69 F.3d 209 (7th Cir. 1995), but counsel argued that *Umpleby* should not bar consideration of the Rule 50 motion in this case and

Eastern Natural Gas, supra, at 1000 (App. A8). The court of appeals opinion does not mention the ENG alternative motion for a new trial on the fraud counterclaim, other than to acknowledge that ENG had moved for a new trial on the fraud counterclaim and that ENG had appealed the trial court's denial of that motion. *Eastern Natural Gas, supra,* at 999 (App. A5). In addition, the court declined to review the district court's denial of ENG's summary judgment motion (on the construction of the contract), finding that the issue was moot after trial (citing *Watson v. Amedco Steel, Inc.*, 29 F.3d 274 (7th Cir. 1994)). *Eastern Natural Gas, supra,* at 1002 (App. A12).[5]

REASONS FOR GRANTING THE WRIT

These closely related questions call for the Court's interpretation of the requirements of FED. R. CIV. P. 50. The issues arise frequently, with literally dozens of recent reported

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that *Umpleby* did not bar consideration of the ENG's motion for a new trial on the counterclaim in any event. The issue was not raised by anyone until counsel for ENG candidly brought up *Umpleby* and addressed its requirements.

[5] ENG also argued to the court of appeals that it was entitled to a new trial on its breach of contract claims because: (a) ENG was prejudiced by the trial court's decision to allow Alcoa to add its fraud counterclaim 11 days before trial, (b) Alcoa withheld material evidence, (c) the district court denied ENG the right to introduce Alcoa's prior inconsistent statements (in interrogatory answers and other pleadings), and (d) the district court erred in ruling that the August 1991 Letter Agreement between ENG and Alcoa was not an enforceable contract. These issues are not raised in this Petition.

decisions on the issues, and the circuits are badly split. On one side of the issues are those circuits which hold that Rule 50 is "a particularly clear and mechanical rule of law" which does not allow the trial judge to "wave his magic wand" to dismiss the rule's procedural requirements as a "technicality." *E.g., Redd v. City of Phenix City*, 934 F.2d 1211, 1214 (11th Cir. 1991). On the other side of the issues are those circuits which hold that: "slavish application of the rule would be 'to succumb to a nominalism and a rigid trial scenario as equally at variance as ambush with the spirit of our rules.'" *E.g., Borhrer v. Hanes Corp.*, 715 F.2d 213, 216 (5th Cir. 1983), *cert. denied* 465 U.S. 1026 (1984), *quoted favorably in Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir. 1990), *cert. denied*, 498 U. S. 855 (1990).

1. **The Court should grant this Petition to resolve the question of whether the failure to renew a motion for judgment as a matter of law at the close of all the evidence may be excused where there has been substantial compliance with FED. R. CIV. P. 50 and the purposes of the rule have been met. This important question is frequently litigated, and the decisions of the circuit courts are irreconcilably in conflict.**

The court of appeals here ruled that ENG's Rule 50 argument was not preserved, even though made at the close of Alcoa's case, because it was not renewed at the close of all the evidence later that day. *Eastern Natural Gas, supra,* at 1000 (App. A8). The court relied on its decision in *Umpleby v. Potter & Brumfield, Inc.*, 69 F..3d 209 (7th Cir. 1995), in which the court "ruled unequivocally that in order to preserve

a motion for judgment as a matter of law which was not granted by the trial court, the motion must be renewed at the close of all the evidence." *Eastern Natural Gas, supra,* at 1000 (App. A8). The Seventh Circuit is of the view that "when Rule 50 was reevaluated and amended in 1991 the advisory committee deliberately retained the requirement to move for judgment prior to the close of the trial" and that, consequently, a rigid interpretation of Rule 50(b), while possibly not required before the 1991 amendments, is required after the 1991 amendments. *Umpleby,* 69 F.3d at 212.

The same harsh construction of the requirements of Rule 50 has been adopted in the Third and Eleventh Circuits (although not because of any reasoning from the 1991 amendments to the Rules). *Mallick v. Int'l. Bhd. of Elec. Workers*, 644 F.2d 228 (3rd Cir. 1981); *Redd v. Phenix City, Ala.*, 934 F.2d 1211 (11th Cir. 1991).[6]

The First, Second, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have ruled that Rule 50(b) does not unequivocally require that a motion for judgment as a matter of law be filed at the close of all the evidence in order for the

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[6] See, also *Mid-America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353 (7th Cir. 1996); *Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132 (7th Cir. 1994); *Mark Seitman & Assoc. v. R. J. Reynolds Tobacco Co.*, 837 F.2d 1527 (11th Cir. 1988); *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3rd Cir. 1978)(review denied even though Rule 50(a) motion was made at the close of the plaintiff's case and made at the close of the evidence in a written motion delivered to the judge's law clerk, but not brought to the judge's attention); *Lowenstein v. Pepsi-Cola Bottling Co. of Pennsauken*, 536 F.2d 9 (3rd Cir. 1976), *cert. denied,* 429 U.S. 966 (1976).

matter to be preserved on appeal. *Robles-Vazquez v. Garcia,* 110 F.3d 204 (1st Cir. 1997)(recognizing a "plain error" exception to the close of all the evidence rule, but finding the exception not applicable in this particular case); *Gibeau v. Nellis*, 18 F.3d 107 (2nd Cir. 1994) (recognizing exception to close of the evidence rule to prevent manifest injustice); *Singer v. Dungan,* 45 F.3d 823 (4th Cir. 1995); *Tamez v. San Marcos, Texas,* 118 F.3d 1085, 1090 (5th Cir. 1997) (failure to make a motion for judgment at the close of the evidence was "a technical, formalistic defect, not a substantive one"); *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir. 1990), *cert. denied*, 498 U.S. 855 (1990)(court avoided adherence to "slavish nominalism" and ruled that, where trial court had indicated, in response to motion for judgment as a matter of law, that the case would be submitted to the jury, and the evidence admitted after the motion was brief and of little consequence, renewing the motion at the close of all the evidence would serve no useful purpose); *BE&K Constr. Co. v. United Bhd. of Carpenters*, 90 F.3d 1318 (8th Cir. 1996); *Trujillo v. Goodman*, 825 F.2d 1453 (10th Cir. 1987).[7] One

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[7] See, also *O'Connor v. Huard*, 117 F.3d 12 (1st Cir. 1997)(recognizing "plain error" exception); *Bay Colony, Ltd. v. Trendmaker, Inc.*, 121 F.3d 998 (5th Cir. 1997)(recognizing exceptions to the close of the evidence rule and finding that objections to jury instructions were sufficient to preserve post-trial motion for judgment as a matter of law); *Satcher v. Honda Motor Co.*, 52 F.3d 1311 (5th Cir. 1995), *cert. denied*, 516 U. S. 1054 (1996); *Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950 (5th Cir. 1993); *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995)(finding, however, that defendant did not fall within exception to the close of the evidence rule); Jusino v. Zayas, 875 F.2d 986 (1st Cir. 1989)(recognizing substantial compliance exception to

commentator suggests that there are five variations in the circuits of what the author characterizes as the liberal application of Rule 50(b). Rollin A. Ransom, Note, *Toward a Liberal Application of the "Close of all the Evidence" Requirement of Rule 50(B) of the Federal Rules of Civil Procedure: Embracing Fairness Over Formalism*, 91 Mich. L. Rev. 1060 (1993).

In addition, a number of circuits have held that any objection to a failure to renew a motion for judgment as a matter of law at the close of all the evidence will be waived where (as here) the nonmoving party fails to raise the objection with the trial court. *Thompson & Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429 (5th Cir. 1996); *Gibeau v. Nellis*, 18 F.3d 107, 109 (2d Cir.1994); *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104 (6th Cir.1987), *cert. denied*, 484 U.S. 913 (1987); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 293-95 (8th Cir.1982), *cert. denied*, 459 U.S. 1205 (1983).

2. The court of appeals' failure to rule on ENG's motion for a new trial effectively denied ENG's right to an appeal on that issue and made even more draconian the penalties imposed by the court's determination that ENG's motion for judgment as a matter of law

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close of the evidence rule); *American Protein Corp. v. AB Volvo*, 844 F.2d 56 (2nd Cir. 1988), *cert. denied*, 488 U.S. 852 (1988); *Boynton v. TRW, Inc.*, 858 F.2d 1178 (6th Cir. 1988)(en banc); *Jones v. City of St. Clair*, 804 F.2d 478 (8th Cir. 1986); *Ebker v. Tan Jay Int'l, Ltd*, 739 F.2d 812 (2nd Cir. 1984); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983).

did not comply with FED. R. CIV. P. 50. The Court should grant the Petition to correct this error and require the court of appeals to act on this timely filed, non-frivolous appeal.

Other than acknowledging that ENG moved for a new trial on the fraud counterclaim and appealed the trial court's denial of that motion, *Eastern Natural Gas, supra*, at 999 (App. A5), the court of appeals made no other mention of the issue. This failure of the court to address the issue was pointed out in ENG's Petition for Rehearing (App. A24), but the petition was denied, and ENG was effectively denied the right to appeal the trial court's decision on ENG's motion.

If the court decided[8] that the motion for new trial was waived because ENG did not file its Rule 50(a) motion at the close of all the evidence, the decision is contrary to Seventh Circuit precedent. The court of appeal's ruling that *Umpleby* bars consideration of the Rule 50 motion should not have affected the consideration of the motion for a new trial. The *Umpleby* opinion makes clear that a request for a new trial based on insufficient evidence is normally:

> [A] viable alternative where a party, as here, might be entitled to judgment as a matter of law but for some reason did not move for judgment at the close of all evidence. 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §2539 at 362 (2nd ed. 1995).

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[8] It is not clear from the opinion that the court "decided" anything with respect to the motion for new trial, but the effect of the opinion was to deny any consideration of the motion for new trial and to deny the new trial.

Umpleby, 69 F.3d at 212-213. To the same effect is the Seventh Circuit's decision in *Mid-America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353 (7th Cir. 1996). See, also, *Mark Seitman & Assoc., Inc. v. R. J. Reynolds Tobacco Co.*, 837 F.2d 1527 (11th Cir. 1988); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §2531 (Supp. 1997).

Regardless of whether there was any rationale for the court's failure to consider the motion for new trial (or to illuminate its consideration), the effect of the opinion was to impose even more draconian penalties for what the court perceived was a failure to comply with the strict requirements of Rule 50(a). Not only was ENG denied any consideration of the merits of its motion for judgment as a matter of law on the counterclaim, the merits of its motion for a new trial were not considered.

The ENG motion for a new trial on the fraud counterclaim cannot be dismissed as so frivolous as to be unworthy of any explicit consideration by the court of appeals. The Alcoa fraud theory evolved during the course of the trial, but in its final version the theory was that: (i) had Alcoa learned of the fraud in January of 1989, the existence of the fraud would have allowed Alcoa to terminate the agreements with ENG, (ii) it would not have subleased the property to anyone else, and (iii) consequently, Alcoa would have saved all of the time and expense it incurred in administering the property between January of 1989 and the Spring of 1994, when the contracts were terminated. During his argument in response to ENG's Fed. R. Civ. P. 50(a) motion, counsel for Alcoa recognized the problems with its proof; the best he could say was that the proof showed that Alcoa *"might"* have abandoned the project; that termination of the project and

resulting savings was *"definitely a possibility"*. (Conf. Tr. Vol. 8 at 1504.)

The Seventh Circuit has held, in a similar case, that "the plaintiff must show that, had it not been for the fraud, he would have been spared an injury and thus would be better off." *Midwest Commerce Banking Co. v. Elkhart City Centre*, 4 F.3d 521, 524 (7th Cir. 1993). The district court's denial of a new trial in this case cannot be reconciled with the decisions, like *Midwest Commerce Banking*, that require damage awards to be supported by more than just speculation.

The appeal in *Mid-America Tablewares, Inc., v. Mogi Trading Co.*, 100 F.3d 1353 (7th Cir. 1996), like the appeal in this case, involved a claim that the proof did not support the award of damages. Yet, there, the defendant's motion for a new trial was considered and granted in spite of its failure to preserve its Rule 50 motion for judgment as a matter of law. The court of appeals ordered a new trial and pointed out that "we take seriously the responsibility of an appellate court to review the sufficiency of the evidence to support the award of damages." *Id.* at 1368. The court had the ability and responsibility to review the verdict in connection with ENG's motion for a new trial. *Cf. Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). When it did not do so in this case, it abdicated its responsibility.

Consideration of the propriety of a new trial is ordinarily closely connected to consideration of a motion for judgment as a matter of law, and a motion for a new trial may be made even if a Rule 50(a) motion was not made before the jury verdict was returned. Here, the failure of the court of appeals to consider (or at least to say that it considered) the timely filed, non-frivolous appeal of the denial of the motion for new

trial essentially denied ENG the right to appeal on that issue and "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." SUP. CT. R. 10. Moreover, as a practical matter, reconsideration of ENG's motion for judgment as a matter of law, which ENG urges the Court is warranted, should necessarily include review of the motion for new trial, in which the same issues are raised.

3. The Court should grant this Petition to resolve a conflict in the circuits on the important question of whether a denial of a summary judgment motion on a matter of law (like other similar pre-verdict decisions on matters of law) may be reviewed on appeal in the absence of a FED. R. CIV. P. 50 motion on the issue.

The Seventh Circuit refused to review the denial of ENG's motion for summary judgment (on the interpretation of the Sublease), relying on its decision in *Watson v. Amedco Steel, Inc.*, 29 F.3d 274 (7th Cir.1994) for the proposition that a summary judgment denial may be reviewed only where the plaintiff notifies the court that it intends to abandon certain claims at trial if the motion is denied.[9] *Eastern Natural Gas, supra,* at 1002 (App. A13).

The Fourth, Fifth, Sixth, Eighth, Ninth, and Federal Circuits have similarly ruled that a summary judgment denial is never reviewable or is only reviewable if renewed as a Rule

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[9] *But, see, Gramercy Mills, Inc. v. Wolens*, 63 F.3d 569 (7th Cir. 1995), discussed below.

50 motion for judgment as a matter of law. *Chesapeake Paper Products Co. v. Stone & Webster Engineering Corp.*, 51 F.3d 1229 (4th Cir. 1995)(rejecting a legal versus factual distinction as affecting review on appeal); *Black v. J.I. Case Co.*, 22 F.3d 568 (5th Cir. 1994), *cert. denied*, 513 U.S. 1017 (1994); *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir.1990); *Metropolitan Life Ins. Co. v. Golden Triangle*, 121 F.3d 351 (8th Cir. 1997); *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352 (9th Cir.1987); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564 (Fed.Cir.1986), *cert. dismissed*, 479 U.S. 1072 (1987). See, also, *Lamc v. Borras*, 16 F.3d 473 (1st Cir.1994)(in which the court suggests, at note 5, that if it were to address the question, it would not review a denial of a summary judgment motion).

The Third and Tenth Circuits, on the other hand, hold that a denial of a summary judgment motion on a matter of law (as opposed to a question of the sufficiency of the evidence) can be reviewed after trial. *Pennbarr Corp. v. Insurance Co. of North America*, 976 F.2d 145 (3rd Cir. 1992)(denial of summary judgment on contract interpretation issue was appropriate for review after trial on the merits - directly contrary to *Metropolitan Life Ins. Co. v. Golden Triangle*, 121 F.3d 351 (8th Cir. 1997), which was also a contract interpretation case); *Ruyle v. Continental Oil Co.*, 44 F.3d 837, 841-42 (10th Cir.1994), *cert. denied*, 516 U.S. 906 (1995).[10] The court in *Ruyle*, in a decision reversing denial of summary judgment on a collateral estoppel issue, ruled that:

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[10] See, also, *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515 (10th Cir. 1997)(court may review denial of summary judgment on a purely legal question, although the case there did not involve such a question); *Wilson v. Union Pacific R.R. Co.*, 56 F.3d 1226 (10th Cir.1995).

"[a] party who properly raises an issue of law before the case goes to the jury 'need not include the issue in a motion for a directed verdict in order to preserve the question on appeal.'" *Id.* at 841-42 (quoting from *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370 (9th Cir. 1987)).

Until its decision in this case, the Seventh Circuit was more in line with the Third and Tenth Circuits than with the other circuits which have held that denials of summary judgments are not reviewable on appeal. Subsequent to its 1994 decision in *Watson v. Amedco Steel, Inc.*, 29 F.3d 274 (7th Cir. 1994), the Seventh Circuit adopted a law-versus-facts distinction in determining whether a denial of a summary judgment motion may be reviewed on appeal. *Gramercy Mills, Inc. v. Wolens*, 63 F.3d 569 (7th Cir. 1995). In reviewing the trial court's decision on a choice of law issue (raised in a summary judgment motion which had been denied), the court of appeals there held that the motion on the choice of law issue was "not equivalent to a motion for summary judgment" (although it was called that by the movant). *Id.* at 571. The court went on to say:

> [T] the choice of law decision is sufficiently independent of the ultimate summary judgment inquiry -- whether there are disputed facts that would lead to different legal results depending on how they are interpreted -- to warrant review independent from any available review of the ultimate summary judgment decision.

Id. at 572. The ENG briefs to the Seventh Circuit in this case called the court's attention to *Gramercy Mills*,[11] but the court's opinion contains no mention of that decision.

The authors of a leading treatise on federal practice have reached the same conclusion as have the Third and Tenth Circuits:

> [T]he denial of a Rule 56 motion is an interlocutory order from which no appeal is available until the entry of judgment following the trial on the merits. *At that time*, the party who unsuccessfully sought summary judgment may argue that the trial court's denial of the Rule 56 motion was erroneous.

10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* §2715 at 636-638 (2nd ed. 1983) (emphasis supplied).

Other circuits have ruled that denials of other pre-verdict motions on legal issues (motions in limine, for example) are reviewable in circumstances which are indistinguishable from summary judgment denials except with respect to the name of the motion. In *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365 (9th Cir. 1987), for example, the court of appeals held that it could review the denial of the defendant's motion in limine (for a determination that the contract in question was unenforceable because of the statute of frauds), even though the defendant had failed to make a Rule 50 motion on the issue. See, also, *Jurgens v. McKasy*, 927 F.2d

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[11] Brief for Appellants at 17, 45, 46; Appellants' Petition for Rehearing at 7-8 (App. A25-26).

1552 (Fed. Cir. 1991)(in which the court reviewed the legal issue of "obviousness" in a patent case even though the appellant had not raised the issue in a Rule 50 motion for directed verdict).

Authors Wright, Miller and Kane also are of the view that the law versus facts distinction still is important and that errors of law can be reviewed on appeal without the filing of a Rule 50 motion:

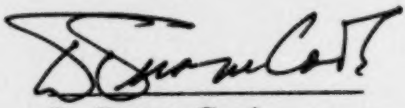
> A renewed motion for judgment as a matter of law under Rule 50(b) is not a condition precedent to appeal from a final judgment. If there have been errors at the trial, duly objected to, dealing with matters other than the sufficiency of the evidence, they may be raised on appeal from the judgment even though there has not been either a renewed motion for judgment as a matter of law or a motion for a new trial, although it is better practice for the parties to give the trial court an opportunity to correct its errors in the first instance.

9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §2540, at 366 (2nd ed. 1995).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted:



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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-4117

EASTERN NATURAL GAS CORPORATION
and DEST EXPLORATION INCORPORATED,
Plaintiffs-Appellants,

v.

ALUMINUM COMPANY OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District or Indiana, Evansville Division.
No.94 C 110-Gene E. Brooks, *Judge.*

ARGUED MAY 22, 1997-DECIDED OCTOBER 3, 1997

Before **COFFEY, EASTERBROOK and ROVNER,**
Circuit Judges.

ROVNER, *Circuit Judge.* Eastern Natural Gas Corp. ("ENG") and Dest Exploration, Inc. ("Dest") discovered that going on the offensive is not always the best strategy. When they sued Aluminum Company of America ("ALCOA") for

breach of contract, ALCOA countersued for fraud. Dest and ENG lost on both claims before a jury and now appeal. We affirm.

I.

ALCOA owned the rights to drill for oil and gas on approximately 40,000 acres of property in Indiana owned by Peabody Development Company. Commensurate with these rights, ALCOA acquired certain obligations to drill on and develop the land. In 1988, ALCOA sublet its rights in the land to ENG in an agreement that required ENG to spend a certain amount of money on the property, and which also required ENG to meet certain drilling obligations. ENG and ALCOA also entered into a gas purchase agreement (the "GPA") which obliged ALCOA to buy from ENG the gas produced from the Peabody land. The Sublease and the GPA were later assigned to Dest with ALCOA's consent. In 1991, after the GPA expired by its own terms, Dest and ALCOA signed a "Letter Agreement" which Dest claimed required ALCOA to enter into a new gas purchase agreement at higher prices.

Dest did not keep up with its contractual obligations and ALCOA began sending notices of default to Dest and ENG in 1993. ALCOA complained that Dest was not drilling the number of wells it was required to drill under the Sublease. Dest countered that it was relieved of its drilling obligations in 1993, and that ALCOA's actions made it impossible for Dest to drill in 1993. Dest also charged ALCOA with

anticipatory repudiation of the GPA. Although ALCOA was not aware of it at the time. Dest was also defaulting on its spending obligation. Larry Corwin, the president of Dest, tried to cover up Dest's failure to meet spending requirements by creating a false invoice in the amount of $81,400, from Geodata Corp., a supplier of geophysical information. Corwin also falsified other documentation to back up the forged invoice so that ALCOA would not discover his deception, and so that ALCOA would believe that Dest and ENG were meeting their spending obligation.

In 1994, Dest sued ALCOA for breach of the Sublease and breach of the Letter Agreement. ALCOA counterclaimed, charging Dest and ENG with negligence in drilling a particular well on the Peabody land, with breaching the Sublease by failing to drill the number of wells required, and with breach of the Letter Agreement. Both sides eventually moved for partial summary judgment. The district court rejected as a matter of law ENG's argument that ALCOA could not declare ENG in default of the Sublease ˜ess and until Peabody declared ALCOA in breach of the primary lease. The court found that although no one disputed that ENG failed to meet the minimum drilling requirements, questions of fact remained about whether ALCOA had prevented ENG from performing the drilling terms of the Sublease. Thus, the court held that issues of fact precluded summary judgment on the issue of which party breached the Sublease.

The district court also found that the Letter Agreement was not a valid contract because it was too indefinite in its terms to be enforceable.[12] At most, the court found, the Letter Agreement was a promise to negotiate in order to come to specific terms for a new gas purchase agreement at some later date. Thus, the district court granted summary judgment in favor of ALCOA on Dest and ENG's claim for breach of the Letter Agreement.

Several months before trial on the remaining issues, ALCOA, in the course of conducting third party discovery, uncovered a discrepancy between invoices produced by third party Geodata and invoices produced by ENG and Dest related to Geodata. ALCOA promptly moved to reopen discovery, and the trial court allowed ALCOA to depose Larry Corwin, the president of ENG. As a result of this deposition, ALCOA determined that Corwin had forged an $81,400 invoice from Geodata in order to make it appear to ALCOA that ENG was meeting its spending obligation under the Sublease. Corwin had also created a check, purportedly to Geodata, which was actually deposited in a Dest account. In addition to this deception, Corwin created "vendor analysis forms" which showed dummy payments to two other vendors, all in furtherance of the scheme to make it appear that ENG was meeting

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[12] After uncovering evidence of fraud committed by Dest's president, ALCOA sought leave to amend its counterclaim so that it could withdraw the contract counterclaim based on the Letter Agreement, and add a claim based on the fraud. As we discuss *infra*, the district court did not abuse its discretion in allowing ALCOA to make these amendments.

its spending obligation. All of this false documentation was presented to ALCOA with the intention that ALCOA rely on the information. And ALCOA did, in fact, rely on the false documentation in deciding to continue its relationship with Dest and ENG. One ALCOA witness, accountant Jerry Van Wert, testified that he "seriously doubt[ed]" whether ALCOA would have continued its relationship with ENG if it had known that ENG was forging documents. ALCOA's in-house counsel, John Holsinger, testified that ALCOA would have "absolutely" terminated its relationship with Dest if it had known that Corwin was lying and forging documents in order to show that it was meeting the spending requirement. Finally, ALCOA employee John Hemphill testified that ALCOA was damaged by relying on the false documents because it continued to work with ENG for a long period of time, expending resources it would not have otherwise spent.

Immediately after the Corwin deposition and approximately three months before trial, ALCOA moved to amend its complaint to add a counterclaim for fraud. Eleven days before trial was to begin, the court allowed the amendment. The jury found for ALCOA on both of ENG and Dest's claims and on ALCOA's counterclaims, rendering a verdict for ALCOA in the amount of $450,000. Because the evidence did not support a verdict in that amount, and because ALCOA was willing to accept a remittitur, the court amended the amount of the judgment to $397,339. Dest and ENG moved for judgment as a matter of law and for a new trial on the breach of contract claim and on the fraud counterclaim, and the trial court denied the motions.

II.

Dest and ENG now appeal from the jury verdict and from the district court's earlier summary judgment ruling, citing a number of alleged errors. They argue that ALCOA did not prove its fraud claim because it did not prove reliance on the false documentation. Furthermore, they argue, the trial court should not have granted ALCOA leave to amend its complaint to add the fraud counterclaim only eleven days before trial because this prejudiced Dest and ENG. On the breach of contract claim, Dest and ENG claim entitlement to a new trial because ALCOA allegedly withheld material evidence and because the trial court refused to allow Dest and ENG to use certain ALCOA pleadings to impeach ALCOA witnesses. Dest and ENG also argue that the district court erred when it ruled on summary judgment that the Letter Agreement was not an enforceable contract and when it ruled that ALCOA could declare default on the Sublease before Peabody declared default on the primary lease. Finally, they claim prejudice to their contract claims from the court's allowance of the fraud claims "on the eve of trial." As we shall see, none of these arguments has any merit.

A.

Because much of the plaintiffs' argument is premised on the district court's allowance of ALCOA's motion to amend the complaint to add the fraud counterclaim, we will address that issue first. We review the district court's grant of a motion to amend for abuse of discretion. *Sanders V. Venture Stores, Inc.*, 56 F.3d 771, 773 (7th Cir. 1995). Federal Rule of Civil Procedure 15 provides that leave to amend "shall be freely given when justice so requires." Thus, we have held

that in the absence of undue delay, undue prejudice to the party opposing the motion, or futility of the amendment, leave should be freely given. *Sanders,* 56 F.3d at 773. Plaintiffs claim they were prejudiced by the late addition of ALCOA's fraud counterclaim to the case because they had insufficient time to answer the counterclaim, prepare for trial on the existing claims and the fraud claim, and engage in any meaningful discovery on the fraud claim. Not surprisingly, plaintiffs focus on the fact that the district court granted leave to amend eleven days before trial began. ALCOA, of course, emphasizes the fact that it moved to add the claim more than two months before the trial date, immediately after uncovering the fraud through third party discovery. ALCOA also points out that plaintiffs were on notice of the possible addition of a fraud counterclaim as soon as ALCOA moved to reopen discovery, approximately three months before trial. Because of this, ALCOA asserts, Dest and ENG had two months to conduct additional discovery and prepare for trial on the original claims as well as the fraud counterclaim. ALCOA also argues that Dest and ENG had the additional benefit of having within their control much of the information regarding the alleged fraud.

The district court carefully considered the potential for prejudice to Dest and ENG. In order to minimize any prejudice, the court allowed plaintiffs to take necessary discovery regarding the fraud claim, and indeed, plaintiffs deposed ALCOA's accountant regarding ALCOA's reliance on the fraud. Dest and ENG belatedly list other discovery they would have taken had they had more time. We have no doubt that plaintiffs wish in hindsight that they had allocated their pretrial resources in a different manner. Although plaintiffs

would have us believe that they had a mere eleven days to prepare for the counterclaim, they in fact were on notice of the counterclaim months before trial. Furthermore, as far as we can tell from the record, plaintiffs did not request a continuance of the trial date in order to facilitate this additional discovery. Dest and ENG have offered no reason for us to believe the district court abused its discretion in allowing the amendment. We will not second-guess the considered judgment of the district court.

B.

ENG and Dest contend that even if the trial court properly allowed the fraud claim, ALCOA failed to prove the claim because it presented no evidence that ALCOA relied on the fraudulent documents to its detriment. Plaintiffs argue that they are entitled to judgment as a matter of law on this claim, but we need not consider the merits of this issue because plaintiffs have waived this claim. As plaintiffs admitted at oral argument, they failed to file a Rule 50 motion for judgment as a matter of law at the close of all the evidence at trial. Instead, they moved for judgment as a matter of law at the close of ALCOA's evidence, but before they presented rebuttal evidence. Dest and ENG conceded at oral argument that our ruling in *Umpleby V. Potter & Brumfield, inc., 69* F.3d 209 (7th Cir. 1995), is determinative here. In *Umpleby,* we ruled unequivocally that in order to preserve a motion for judgment as a matter of law which was not granted by the trial court, the motion must be renewed at the close of all the evidence. 69 F.3d at 212. Dest and Eng admittedly failed to preserve their Rule 50 argument.

C.

Dest and ENG also claim they are entitled to a new trial on their contract claim because ALCOA withheld material evidence, and because the trial court refused to allow Dest and ENG to use certain pleadings to impeach ALCOA witnesses. We review for abuse of discretion a trial court's refusal to grant a new trial. *M. T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1407 (7th Cir. 1991). We grant a new trial only when the verdict is against the clear weight of the evidence, and will not set aside a jury verdict if a reasonable basis exists in the record to support the verdict. *Id.* Dest and ENG face an uphill battle here.

Plaintiffs claim that ALCOA withheld documents to which they were entitled once ALCOA decided to put its in-house counsel on the stand. ALCOA had withheld as attorney-client privileged the files of Mark Holsinger, its in-house counsel. ALCOA listed Holsinger as a potential trial witness weeks before trial began, and Dest and ENG made no effort to compel production at that time of the previously withheld documents. At trial, Holsinger was called to testify about, among other things, ALCOA's reliance on the fraudulent Geodata invoice and supporting documentation. Mter Holsinger testified for a day, Dest and ENG called for the production of privileged documents, and in particular for "Mr. Holsinger's notes and his memos to the Alcoa people and the Alcoa's people [sic] memos to him." *See* Transcript of Jury Trial, Volume 5, at p.813. This request was made on a Friday afternoon, and on Sunday night, certain documents from Holsinger's files were produced to the plaintiffs. On Monday morning, plaintiffs complained to the court that although

ALCOA had produced correspondence *from* Holsinger, they had not produced correspondence *to* Holsinger. With Holsinger about to retake the stand, counsel for ENG and Dest commented to the court that the problem of the missing documents was "not something that we need to deal with on this witness." *See* Transcript of Jury Trial, Volume 6, at p.828. Dest and ENG did not raise the issue of the missing documents again before the trial court.

On appeal, they 4aim that "[a]fter the trial, and not earlier" they learned that ALCOA had not produced all of the privileged documents to which they believed they were entitled. Because of this withholding, Dest and ENG claim they are entitled to a new trial. But again, Dest and ENG have waived this claim. By their own admissions, they knew during trial that ALCOA had not produced all of the documents in question, but they failed to object, or move to preclude testimony or to compel production, or even request a continuance so that they could determine what to do about any missing documents. They admitted in their brief to this Court that they were "dimly aware" that the requested production was not complete, but they did nothing at trial to remedy that situation. They were aware enough to raise the issue with the district court that Monday morning, but then informed the district court that the issue need not be addressed during Hol singer's testimony. It was up to Dest and ENG to raise the issue anew before they were prejudiced by the fa˜ure to produce, and certainly before the end of trial. We will not address the issue of prejudice from the missing documents for the first time on appeal.

Nor are we persuaded that Dest and ENG are entifled to a new trial because the district court refused to allow them to use certain superseded pleadings to impeach ALCOA witnesses. We review for abuse of discretion any evidentiary rulings of the district court. *Whalen u. Rubin,* 91 F.3d 1041, 1046 (7th Cir. 1996). The district courts have broad discretion to make rulings under Federal Rule of Evidence 403, and we are reluctant to second-guess them. *Id.* After discovering the potential fraud claim, ALCOA moved to amend its complaint and other pleadings to withdraw some claims and add another. The amendment at issue here is ALCOA's withdrawal of its breach of contract claim, based on the Letter Agreement. When Dest and ENG attempted at trial to introduce ALCOA's prior pleadings, ALCOA moved under Rule 403 to exclude the prior pleadings as unnecessarily confusing in an already complex case. The district court agreed that the case was complex and that certain parts of the prior pleadings would likely confuse the jury. But the district court was also concerned about fairness to Dest and ENG, because they may have been relying on these pleadings in shaping their case. The district court resolved this conflict by ruling that documents involving withdrawn legal theories (as opposed to withdrawn factual theories) were not admissible, but that Dest and ENG could question any ALCOA witnesses concerning any statement, whether factual or legal, made in the prior pleadings. Thus, although the pleadings were not admitted as evidence, Dest and ENG were allowed to use the prior pleadings to impeach witnesses or to refresh recollection, minimizing any prejudice.

Dest and ENG rely on *Contractor Utility Sales Co. v. Certain-teed Products Corp.,* 638 F.2d 1061 (7th Cir. 1981),

and *Buscaglia v. United States,* 25 F.3d 530 (7th Cir. 1994), to support their contention that the district court abused its discretion in refusing to admit the prior pleadings as evidence. Neither supports plaintiffs' position, however. In *Certain-teed Products,* the district court concluded that prior pleadings are not admissions, and thus were inadmissible. We held that although "prior pleadings cease to be conclusive judicial admissions, they are admissible in a civil action as evidentiary admissions." 638 F.2d at 1084. The party opposing admission of the prior pleading had not raised a Rule 403 argument, and thus neither the district court nor this Court addressed whether the probative value of the pleadings in that case outweighed the risk of confusing jury, the central issue in the instant case. In *Buscaglia,* the district court ruled inadmissiHe an expert report that plaintiff sought to introduce into evidence. We held that the district court erred in ruling that the report failed to meet the standards for admissibility under Rule 702, which governs admissibility of expert testimony. The district court further erred by considering factors that went to the weight of the evidence rather than its admissibility in deciding that the report should also be excluded under Rule 403. Finally, in balancing the Rule 403 factors, the district court failed to account for the fact that the case was tried to the court, and not to a jury.

In stark contrast, the district court here was clearly aware that prior pleadings were generaHy admissi˜e. But in this complex jury trial, the court decided on balance that the pleadings posed a serious risk of confusing the jury, and that this risk outweighed the probative value of the pleadings. In order to minimize prejudice to Dest and ENG, the district court allowed plaintiffs to use the pleadings to cross-examine

witnesses and refresh their recollections. When we review for abuse of discretion, we do not second-guess the considered judgment of the district court. Dest and ENG offer us no reason to believe the district court abused its discretion; rather they appear to be asking us to reweigh the Rule 403 factors in an effort to convince us that these documents were more important to their case than the district court realized, and that the district court overstated the risk of jury confusion. But we do not engage in this kind of reweighing when we review for abuse of discretion. *See United States v. Prevatte,* 16 F.3d 767, 774 (7th Cir. 1994) (in determining if the district court has abused its discretion in making an evidentiary ruling, we shall not second-guess a decision that is in conformity with established legal principles; rather we inquire whether the decision made by the trial court is within the range of options from which one would expect a reasonable trial judge to select). Therefore, we find that the district court did not abuse its discretion here. Accordingly, Dest and ENG are not entitled to a new trial on the contract claim.

D.

Dest and ENG challenge the district court's grant of summary judgment, finding that the Letter Agreement was not an enforceable contract. They also contest the district court's denial of summary judgment on the issue of whether ALCOA could declare a default against the plaintiffs before Peabody declared a default against ALCOA. We can easily dispense with the second claim because the district court's refusal to grant summary judgment, followed by a full trial on the merits, is not reviewable by this Court. *See Watson v. Amedco Steel, Inc.,* 29 F.3d 274, 277 (7th Cir. 1994). In denying a

motion for summary judgment, the district court decides only that the case should go to trial. *Id.* Once the case has gone to trial, denial of summary judgment becomes moot, with one limited exception: in the rare case where the plaintiff notifies the court that it intends to abandon certain claims at trial if summary judgment is denied, we will review the denial of summary judgment. *Id.*, 29 F.3d at 278. This case does not come under the exception and we decline to review the district court's denial of summary judgment.

On the issue of whether the letter agreement constituted an enforceable contract, we review the district court's grant of summary judgment *de novo. Pasqua v. Metropolitan Life Ins. Co.*, 101 F.3d 514, 516 (7th Cir. 1996). We draw all reasonable inferences in the light most favorable to the non-moving party. *Id.* Keeping those standards in mind, the two-page letter signed by Dest and ALCOA represents, at best, an agreement to agree, and under Indiana law such a document does not constitute a binding contract. *See Equiimart Ltd. Inc.* v *Epperly,* 545 N.E.2d 595, 598 (md. App. 1st Dist. 1989). A letter that does not contain definite and specific terms, and that is contingent upon further negotiations and execution of a final agreement, is not a contract under Indiana law. *Id.* The two-page letter agreement here describes a drilling "obligation" and an intent to renego tiate a gas purchase agreement. The drilling obligation is contingent upon the negotiation and execution of an Amended Gas Purchase Agreement." The letter recites various terms that the amended gas purchase agreement is to address, but contains no resolution or specification for these terms. We agree with the district court's conclusion that the letter agreement is much

like the letter of intent in *Equimart*. The district court properly granted summary judgment on this claim.

E.

Finally, Dest and ENG claim they are entitled to a new trial on the contract claim because they were prejudiced in litigating the contract claim in light of the late addition of ALCOA's fraud counterclaim to the case. We have already decided that the district court did not abuse its discretion in allowing ALCOA to amend its counterclaim to add the fraud count. Furthermore, Dest and ENG failed to preserve any objection to the effect of the fraud claim on the contract claim, because they failed to ask for a continuance of the trial date.

AFFIRMED.

A true Copy:

Teste:

/S/_____
Clerk of the United States Court
of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Decided December 1, 1997

Before

Honorable John L. Coffey, *Circuit Judge*
Honorable Frank H. Easterbrook, *Circuit Judge*
Honorable Ilana Diamond Rovner, *Circuit Judge*

96-4117

Appeal from the United States
District Court for the Southern District of
Indiana, Evansville Division

No. EV 94-110-C-R/H
Gene E. Brooks, Judge.

EASTERN NATURAL GAS CORP.
and DEST EXPLORATION, INC.,
Plaintiffs-Appellants,

v.

ALUMINUM COMPANY OF
AMERICA,
Defendant-Appellee.

ORDER

On consideration of the petition for rehearing filed by plaintiffs-appellants on October 17, 1997, all of the judges on the panel having voted to deny to same.

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

CASE NO. 96-4117

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EASTERN NATURAL GAS CORP.
and DEST EXPLORATION, INC.,
Plaintiffs-Appellants,

v.

ALUMINUM COMPANY OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Indiana, Evansville Division,
The Honorable Gene E. Brooks, Judge

Cause No. EV 94-110-C-R/H

APPELLANTS' PETITION FOR REHEARING

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STATEMENT OF ISSUES
PRESENTED FOR RECONSIDERATION

4. Alcoa never raised the objection that the ENG and Dest Rule 50 motion on the fraud counterclaim was untimely and, consequently, the objection was waived. The Court should consider and grant the ENG and Dest motion for judgment as a matter of law on the ALCA counterclaim.

5. The Court failed to rule on the Appellants' alternative motion for a new trial on the fraud counterclaim. That motion should be considered and granted.

6. Gramercy Mills, Inc. v. Wolens, 63 F.3d 569 (7th Cir. 1995) is controlling and does allow the consideration on appeal of the denial of the ENG and Dest summary judgment motion. The Court should consider the appeal and grant the ENG and Dest motion for summary judgment on the construction of the Agreement to Sublease.

STATEMENT OF THE CASE

Nature of Case, Course of Proceedings And Disposition:

The Court rendered its decision in this case on October 3, 1997. The Court affirmed the jury verdict against Appellants, Eastern Natural Gas Corp. ("ENG") and Dest Exploration, Inc. ("Dest"), on their breach of contract claims against Aluminum Company of America ("ALCOA"), and the jury verdict in favor of ALCOA on its fraud counterclaim. The Court declined to review the ENG and DEST motion for judgment as a matter of law on the counterclaim because, while counsel moved for judgment at the close of Alcoa's case he did not renew the Rule 50 motion at the close of all the evidence. The Court did not rule on the ENG and Dest alternative motion for a new trial on the fraud counterclaim. In addition, the Court declined to review the district court's denial of ENG and DEST's summary judgment motion on construction of the Agreement to Sublease[12], finding that the issue was moot after trial under this Court's holding in Watson v. Amedco Steel, Inc., 29 F.3d 274 (7th Cir. 1994). This petition asks the Court to consider and rule on the merits of each of these three issues raised by ENG and Dest on appeal.

Statement of Facts:

At the beginning of his oral argument in this case, counsel for Appellants volunteered to the Court that he had recently read the Court's decision in Umpleby v. Potter & Brumfield, Inc., 69 F.3d 209 (7th Cir. 1995), which is

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[12] ENG and Dest argued that, as a matter of contract construction, and therefore a matter of law for the court, the Agreement to Sublease (between Alcoa and ENG) did not give Alcoa the right to declare a default until a default was declared under the Lease (between Alcoa and Peabody Development Company).

arguably applicable to the Appellants' appeal of the counterclaim judgment. Neither the District Court nor counsel for Alcoa ever raised the issue of the timeliness of the Rule 50 motion, and the matter was not raised as the result of questions from the bench during oral argument. After raising the issue, Counsel for ENG and Dest argued that Umpleby should not bar consideration of the Rule 50 motion in this case and that Umpleby did not bar consideration of the Appellants' motion for a new trial on the counterclaim in any event.[13]

No other facts, except as have already been presented in Appellants' Briefs, are necessary for an understanding of the issues raised in this Petition.

ARGUMENT

I. Alcoa never raised the objection that the ENG and Dest Rule 50 motion on the fraud counterclaim was untimely and, consequently, the objection was waived.

ALCOA did not claim that the ENG and Dest Rule 50 motion was untimely, either in its briefs to the trial court or in its brief on appeal. In fact, neither party briefed the issue and it came up only because counsel for ENG and Dest raised the question for the first time during oral argument. This Court has repeatedly held that arguments not presented to the trial court are waived and cannot be raised for the first time on appeal. See, for example, In re: Kroner, 953 F.2d 317 (7th Cir. 1992). At least one other Circuit has held that this rule is equally applicable when the timeliness of the motion for judgment is the issue which is raised for the first time on

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[13] The oral argument has not been transcribed. Counsel cannot, consequently, cite to the transcript for support of this argument. However, counsel has listened to the tape of the argument and the discussion of Umpleby is at the very beginning of the argument.

appeal. Gibeau v. Nellis, 18 F.3d 107 (2nd Cir. 1994). In Gibeau, the court of appeals considered appellant's Rule 50, motion even though it had not been made at the close of the evidence at trial. The court ruled that the appellees had waived their objection to the timeliness of the Rule 50 motion by not raising the issue with the district court. Here, Alcoa did not even raise the objection with the Court of Appeals. The Court should reconsider and reverse its determination that Umpleby v. Potter & Brumfield, Inc., 69 F.3d 209 (7th Cir. 1995) prevents consideration of the ENG and Dest motion for judgment as a matter of law.

The Court should not deviate from its normal practice and consider an argument that Alcoa *never* raised. It is true that counsel for ENG brought up the issue of the possible application of Umpleby during oral argument, but, contrary to the determination of the Court (on p. 7 of the slip opinion), counsel did not concede that Umpleby is determinative. Counsel argued that Umpleby should not bar consideration of the ENG and Dest motion for judgment as a matter of law.[14] In other words, nothing that counsel said during oral argument should save ALCOA from strict application of the rule that new issues will not be considered on appeal. Moreover, given the failure of ALCOA to offer credible proof of its reliance and damages, and given the fact that ALCOA was well aprised that ENG and Dest were asserting a right to judgment as a matter of law, considerations of justice weigh in favor of deviation from the Court's strict reading of the Umpleby precedent, not in favor of deviation from the principle that issues not presented below are not preserved on appeal.

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[14] See, note 1 above.

II. The Court failed to rule on the Appellants' alternative motion for a new trial on the fraud counterclaim. That motion should be considered and granted.

As the Court has acknowledged (see, slip opinion at p. 5), ENG and DEST moved for judgment as a matter of law and for a new trial on both the breach of contract claim and on the fraud counterclaim. The Court's ruling that Umpleby bars consideration of the Rule 50 motion should not have effected the consideration of the motion for a new trial.[15] The Umpleby opinion makes clear that a request for a new trial based on insufficient evidence is normally "a viable alternative where a party, as here, might be entitled to judgment as a matter of law but for some reason did not move for judgment at the close of all evidence. 9A Charles A Wright & Arthur W. Miller, Federal Practice and Procedure §2539 at 362 (2nd ed. 1995)." Umpleby, supra, at 212-213. See, also, Mid-America Tablewares, Inc. v. Mogi Trading Co., LTD., 100 F.3d 1353 (7th Cir. 1996) (defendant's motion for a new trial was considered and granted in spite of its failure to preserve its Rule 50 motion for judgment as a matter of law).

Mid America Tablewares involved a contract claim, rather than a fraud claim, but the appeal there, like the appeal in this case, involved a claim that the proof did not support the award of damages. The Court there held that it would not consider the defendant's motion for judgment as a matter of law on the damage issue, because the motion had not been timely made, although the Court did go on to hold (after a

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[15] Counsel is just guessing here that the decision on the Rule 50 motion is related to the failure of the decision to address the motion for new trial; but, there is no way to know. The Court did not deny the motion for new trial; other than acknowledging that the motion was made, the opinion does not address the motion in any way.

considerable review of the facts and the law) that, even if it did consider the motion, it would deny it. Id. at 1365. However, the Court held that the defendant's motion for a new trial on damages should be granted. The Court pointed out that "we take seriously the responsibility of an appellate court to review the sufficiency of the evidence to support the award of damages." Id. at 1368. The Court held that "the size of the jury's award in this case can only be understood as resting on one speculative inference heaped upon another." Id. at 1368. In the case at bar, the jury's award is even less well grounded than the jury award in Mid-America Tablewares.

Alcoa did not prove its fraud claim. Its only evidence was that it "might" have acted differently or "might" have saved money had it learned of the fraud in 1988 or 1989. That evidence is not sufficient to support a $450,000 judgment (later reduced by the trial court to $397,339) and a new trial, consequently, should be ordered. The best that counsel for ALCOA could offer during his argument in response to plaintiffs' Fed. R. Civ. P. 50 motion was that savings had the fraud been discovered (the only basis for the ALCOA damage claim) were *"definitely a possibility."* (Conf. Vol. 8, at 1504.)

This Court has held that in a case like this "the plaintiff must show that, had it not been for the fraud, he would have been spared an injury and thus would be better off." Midwest Commerce Banking Company v. Elkhart City Centre, 4 F.3d 521, 524 (7th Cir. 1993). The district court's denial of a new trial in this case cannot be reconciled with the decisions of this Court, like Midwest Commerce Banking and Mid-America Tablewares, that require damage awards to be supported by more than just speculation.

III. Gramercy Mills, Inc. v. Wolens, 63 F.3d 569 (7th Cir. 1995) is controlling and does allow the consideration on appeal of the denial of the Appellant's summary judgment motion.

The Court determined that the denial of Appellants' summary judgment on the construction of the Agreement to Sublease was "moot." (Slip Opinion at p. 12) There is no indication in the opinion that the Court considered Gramercy Mills, Inc. v. Wolens, 63 F.3d 569 (7th Cir. 1995). Gramercy Mills is controlling and does allow the consideration on appeal of the denial of the Appellant's summary judgment motion.

This court has often stated that review of a district court's grant *or denial* of a summary judgment motion should be de novo. See, for example, Trustees of Indiana University v. Aetna Casualty & Surety Company, 920 F.2d 429 (7th Cir. 1990). More recently, however, this Court has held that "[a]s a general rule, the denial of a motion for summary judgment is not subject to review once the district court has conducted a full trial on the merits of a claim. Watson v. Amedco Steel, 29 F.3d 274 (7th Cir. 1994).

Gramercy Mills, Inc. v. Wolens, 63 F.3d 569 (7th Cir. 1995), makes clear that this Court has not adopted the rigid rule that denials of summary judgment motions will never be reviewed. There, Gramercy filed a pleading which it called "Pretrial Motion" in which it requested that the trial court apply New Jersey law to the case and, alternatively, sought summary judgment. Wolens argued that the choice of law issue was not preserved after trial of the case, apparently arguing from the reasoning in Watson, supra, and similar cases. Gramercy argued that the choice of law issue was distinct from the summary judgment issue and the Court held:

> We agree. Judges, not juries, decide questions of law, such as choice of law issues. Gramercy's motion, at least as far as it pertained to the choice of law issue, was not

> equivalent to a motion for summary judgment, a motion that attempts to avoid a trial based on a lack of disputed facts. See. FED. R. CIV. PRO. 56(c). . . . [T]he choice of law decision is sufficiently independent of the ultimate summary judgment inquiry— whether there are disputed facts that would lead to different legal results depending upon how they are interpreted — to warrant review independent from any available review of the ultimate summary judgment decision. Therefore, we shall review Gramercy's appeal of the district court's choice of law.

Id. at 571 and 572.

The Agreement to Sublease, in Section 2(f), provides that: *"ENG shall be entitled to the exclusive right to exercise all the rights and privileges granted to . . . Alcoa under the Lease . . . ."* (App. A63.) Alcoa declared Dest in default of the *Agreement to Sublease* for the alleged failure of Dest to comply with certain drilling commitments imposed by the *Lease*. The Agreement to Sublease does not provide that Alcoa can declare Dest in default (of the terms of the Lease) before Alcoa receives a notice of default from Peabody. The Agreement to Sublease says just the opposite, it says that Dest shall - "exclusively" - have all the rights and privileges of Alcoa under the Lease. This is strictly a legal issue for which no proof taking at trial is necessary or even allowed. The logical outcome of the Court's decision in this case is that a denial of a summary judgment motion on a legal issue may not be reviewed after trial. That cannot be the law. How else is such a legal issue to be reviewed? Must every legal issue raised in a denial of a summary judgment motion be taken as an interlocutory appeal?

CONCLUSION

This Court should reconsider its decision and review the district court's denial of the ENG and Dest motion for judgment as a matter of law on the ALCOA counterclaim.

Should this Court not reconsider the ENG and Dest motion for judgment as a matter of law or should this Court not grant the motion, a new trail on the fraud counterclaim should be granted because the verdict is against the weight of the evidence and the damages awarded are excessive. ENG and Dest have not waived their claim for a new trial on the counterclaim.

In addition, the Court should reconsider its decision on the ENG and Dest appeal of the district court's denial of their summary judgment. The Court can and should, for the reasons outlined in its Gramercy decision, consider this appeal, and the Court should, for the reasons stated in the ENG and Dest briefs to this Court, overrule the district court's denial of the summary judgment on the interpretation of the Agreement to Sublease.

Dated: October 16, 1997
Respectfully submitted,

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Counsel for Appellants

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Appellants' Petition for Rehearing, was mailed, postage prepaid, to Thomas G. Rohback and Lynn A. Ellenberger, LeBouef, Lamb, Greene & MacRae, 601 Grant Street, Pittsburgh, PA 15219, and to Benjamin C. Cubbage, Jr., P.O. Box 17, 600 Barrett Blvd., Henderson, KY 42420, Attorneys for Defendant, on this 16th day of October, 1997.

_____

D. Duane Cook